STATE OF TENNESSEE

DEPARTMENT OF EDUCATION

M.T.W.	)	**Case No. 04-20**
	)	
	)	
Claimant,	)	**ALJ: HON. KEVIN S. KEY**
	)	
vs.	)	
	)	
ROBERTSON COUNTY SCHOOLS	)	
	)	
Respondent.	)	

FINAL DECISION

The parties are not identified in the main body of the decision in order to protect the confidentiality of the persons involved. The names used are as follows:

M.W., father

D.W., mother

M.T.W., student, or child

Robertson County School System, LEA or school system

KEVIN S. KEY, #9519
Administrative Law Judge
222 Second Avenue North
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FINAL DECISION

This decision concerns a 15 year old student who was a freshman in the high school of zone for the beginning of the 2003-2004 school year. The student had been enrolled in his county school system through the neighborhood schools since kindergarten.

Because of the student's behavior problems in February 2000 parent privately sought a private evaluation. Upon completion of the evaluation the psychologist found the student was ADHD and this child began receiving medical treatment from a physician. The school system was made aware of this condition and after meeting with the mother, who was a part-time substitute teacher in the LEA, the decision was that the child would not be certified as health impaired and thus would not eligible for services under IDEA because the student's grades were As and Bs. Rather, on March 9, 2000 a 504 accommodation plan was created.

The 504 Plan was continued with modifications in September 2000. Because of certain problems, including behavior, the parents formally requested a referral to special education on February 15, 2001. The 504 coordinator for the student's current school stated that the student did not meet those state and federal guidelines per her review of the student's psychological report and that she would need additional documentation of the student's disability. The parents did provide additional documentation and asked that special education personnel be included in the meeting. This request for referral for evaluation for special education was not followed through because the mother later had reservations about the classification of her son as a special education student because

of the possible stigma of the child as a special education student.

Instead, a new 504 Plan to accommodate his ADHD was instituted in March 2001. At the end of the school year the student had three A's and two B's. The student was referred to Vanderbilt Division of Child and Adolescent Psychiatry which confirmed the diagnosis of ADHD. The LEA staff met with the parents on August 1, 2001 to review eligibility for IDEA. This was rejected because of the student's performance.

On August 7, 2001 a 504 meeting created a new 504 Plan. The plan was modified in December 2001 and at the end of that school year the student had one A, one B, two C's and two D's.

September 18, 2002 the 504 Plan was modified with parent participation. During this meeting the parent brought a three-page typewritten summary which she wanted incorporated in the 504 Plan. This summary was attached. Another 504 meeting was held on October 30, 2002 during which time it was brought to the school's attention that there had been 12 in-school suspensions since the beginning of the year. During the course of the entire year the student ended up being sent to in-school suspension or detention a total of 60 times. At the end of the 2002-2003 school year the student's grades were two Cs and four Fs.

On June 4, 2003 a 504 Plan was created for summer school. The student took English, reading and math obtaining one B and two Cs.

At the beginning of the 2003-2004 school year the LEA 504 coordinator discussed with the parent the summer 504 Plan which had seemed to be successful. This plan was carried over to this school year.

In early August 2003 the student was found to be in possession of another student's wallet. A manifestation determination was held under the 504 Plan and the parent and student argued that his possession of the wallet was a manifestation of his ADHD. All other members of the manifestation team disagreed and a two-day suspension was imposed. The student continued to exhibit inappropriate behavior, including numerous in school suspensions.

This matter came to a head on November 3, 2003 when the student, during class, went to the bathroom with permission and found scribbled on the wall certain Columbine type threats.

> "Beware the day is coming when all who had done us wrong will die as E and D did tried to do at Columbine. We will kick start the revolution of justice. The day will come when all you ass preppies that make our life hell will die. I will kill you soon. R and D. J-O-S-H-I-E."

Another message stated:

> "Beware. December 1st will be a bloody day."

The messages were discovered by school personnel and an investigation began.

On or about November 10, 2003 the assistant principal at the school talked to several students about these messages. The student who is the party to this due process hearing name was mentioned and the assistant principal met with him. He denied having knowledge of the writings. The assistant principal instructed him not to talk about the incident.

The student then talked about the messages to other students at different times.

In one instance he was approached by fellow students in the cafeteria at lunch and was asked about the statements. The student talked about the statements. Also, the student talked about the possible future incident in front of an English teacher without provocation, stating words to the effect "Isn't it ironic that the preppies - some of the preppies that were targeted are in this room right now." Later that day he talked about the incident without provocation to a friend in front of the school nurse at the end of the school day. The record also indicates the student contacted a female student over the internet to discuss this matter. The student told his fellow student not to attend school and to tell another friend not to go, that the shootings and bombings were to be carried out by a sophomore and a former student. The last incident was the incident which brought this matter to a head. The friend, who was contacted by Instant Messenger, informed her father of this conversation and the father apparently contacted other parents along with the principal the next day. As a result, on the threatened day, approximately one-third of the student body failed to attend the school because of the perceived threat of a Columbine type incident occurring on that day.

The threat was traced back to the student in question and the assistant principal on November 12, 2003 suspended the student.

A manifestation determination was held on November 14, 2003. The manifestation team was led by the assistant principal who provided some, though not all documentation concerning this incident to the manifestation determination team. The student did not attend the meeting because of the school system's suspension specifically provided the student could not be on campus. The mother of the student did

attend and was allowed to provide a statement from the child's treating licensed social work concerning the effects of his ADHD. The manifestation team determined that the incident in question did not arise out of his ADHD.

The student was then referred to the LEA disciplinary authority which reviewed the incident and provided for suspension from the school for the balance of the school year instead of the one-year requested by the assistant principal. The student was placed in the alternative school and a due process hearing request was initiated by the parents on November 20, 2003 to the LEA. In December 2003 the school superintendent sent a letter to the parents stating that he would override the disciplinary authority and allow the student to return to his school. The parents declined this relief in the absence of a transition plan. In addition, the staff of the LEA contacted the district attorney and charges were levied in Juvenile Court against the student.

Because of the student's 504 classification the LEA treated this as a request for a hearing under 504.[1] The school system began evaluation of the student for eligibility under IDEA and subsequently the student was classified as health impaired and as eligible for IDEA. As a result of the parents' choice the student continued to attend the alternative school and obtained passing grades for the 2003-2004 school year.

DISCUSSION

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[1]504 hearing requests are handled directly by the agency involved. This requires the institution to contract with a private contractor. This ALJ was contacted in late January 2004 but was not approved by the LEA school board until February 2004. As a result of the review of the request by the ALJ with the counsel for the parents and the LEA, this matter was referred back to the State Department of Education and this hearing officer, a duly qualified hearing officer under IDEA was appointed by the Tennessee Department of Education and this matter has been conducted under IDEA as well and Tennessee Code Annotated §49-10-101 *et seq.* and Section 504 of the Rehabilitation Act of 1973.

I. Whether the Local School System appropriately carried out its duty of child find and the implementation of a program thereupon?

The parents argue that the LEA failed to properly identify and evaluate this student and as a result of the failure of the LEA this student was denied appropriate services under IDEA. It obviously had knowledge that the child was diagnosed as ADHD since at least 2000. The LEA failed to carry out its own evaluation, relying on the private evaluation obtained by the parents in 2000 along with subsequent documentation. However, the diagnosis of ADHD alone does not trigger special education services. The case law is quite clear an LEA can force an evaluation of a student in order to determine eligibility for services but cannot forcibly provide special education services over the parents consent. Everyone knew since at least the year 2000 that the student was ADHD. Because the student was making A's and B's, classification of the student in need of special education was not warranted.

When difficulties arose later, the student could easily have been classified in need of special education. There could have been a later determination as health impaired for special education services. The only reason that this student had not been provided an IEP Plan under IDEA was the parents' reluctance to have the child so classified. 34 C.F.R. §300.505(a)(1) specifically provides that informed parental consent must be obtained before initial evaluation, re-evaluation or the initial provision of special education and related services to a child with a disability. The school system can request a due process hearing to force evaluation if its personnel believe such an evaluation is necessary but cannot force the provision of special education services.

See Letter to Cox 36 IDELR 66; Letter to Yudeien, 38 IDELR 267; Letter to Gantwerk, 39 IDELR 215; Letter to Manasevit, 41 IDELR 36. All these OSEP opinions make it clear that the parent can refuse special education services even if the child is eligible and the school system does not have to provide those special education services. In light of the parents equivocation on this point the failure to serve this student under IDEA is not grounds for relief.

II. Whether the manifestation determination was correct at least to some of the incidents involved.

After the initial discovery of the writings on the bathroom wall and interview with the student the assistant principal admonished the student not to talk about this incident. The first incident which seems to be at issue was talking about the potential Columbine incident in the cafeteria. Based upon both the expert used by the parent and the school system while the assistant principal made an admonition, there was no true rehearsal as used in connection with the ADHD students. This Administrative Law Judge finds that under the circumstances of the cafeteria incident, that the student's actions were a manifestation of his ADHD. However, there were other incidents. The most critical among these was the day the student, unprovoked, blurted out in class about certain individuals who were targeted. There is no finding of or impulsiveness in this statement under the circumstances. Also, the school nurse heard the student talking about the whole affair to another student in an unprovoked manner. Under the circumstances this Administrative Law Judge finds that these actions were not related to his ADHD.

Finally, the incident which seemed to bring this matter to a head, the instant messaging to a fellow student was neither provoked nor impulsive. Indeed, this Administrative Law Judge finds that while the female student does evidence some confusion, I find the female student credible in this incident. The Administrative Law Judge noted an earlier psychological report when the student was in middle school that he failed to resent the abuse he was receiving from fellow students. During the hearing neither party would acknowledge that this student was the recipient of such abuse, but the fellow student to whom he e-mailed specifically stated words to the effect that just because the student was being abused by other students that didn't make it right to have them killed or injured. This statement along with the earlier report leaves this Administrative Law Judge to believe the student, who is the subject of this due process hearing, was the subject of abuse by his fellow students. This seems to be the true provocation for his statements. This is reinforced by the nature of the statement made in class earlier in which he noticed that the putative victims of the potential Columbine type incident were in the room. This Administrative Law Judge finds that while this student, based upon observation of the student's demeanor, would have never participated or carried out such threats, but the ability to verbally strike back at those who tormented him was natural and foreseeable reaction to his current situation. None of the latter statements seem to be related to ADHD.

III. Whether this hearing officer has jurisdiction over juvenile court.

This Administrative Law Judge has no jurisdiction over Juvenile Court in this

matter. While the decision in Morgan v. Chris L, 106 F. 3d 401 (6th 1997) is similar in some circumstances, the LEA in that case sought to use the Juvenile Court system to avoid providing services to the student. In effect, the LEA was using the Juvenile Court to avoid its duties to the student.

In the instant matter the LEA continued to provide services in the alternative educational settings and indeed offered to rescind the suspension from the school of zone.

If an LEA believes that a crime has been committed, then it has the right to refer the matter to proper authorities for review and action under 20 U.S.C. § 1451(k)(g) as long as it continues to carry out its duties under IDEA or Section 504.

IV. Whether there was some effect of procedural violations.

It is undisputed that the student requested a due process hearing under both IDEA and 504 on November 20, 2003 to the LEA. Because of the then classification of the student only under 504 Robertson County did not react to the IDEA request by promptly sending this matter to the state for assignment to an Administrative Law Judge. However, as stated in the first section above the student at that time had not been determined to be eligible for IDEA because of the parents' choice.

In reviewing the progress of the 2003-2004 school year it is found that the student, when placed in the alternative school for the remainder of the year did much better. The school system superintendent offered to return the student in December 2003 to the school of the zone. Because of circumstances discussed below this

Administrative Law Judge believes the parents were right in not allowing the student to ever return to his school of zone. Subsequently, the school system has classified this student as eligible for special education services under health impaired and is ready to provide services.

Normally, the Administrative Law Judge would let this matter go no further based upon the current IEP. However, based upon all the record before this Administrative Law Judge, I find that this student can never receive an appropriate education in his school of zone.

The mother testified and it was undisputed, that at a PTO meeting subsequent to the incident a teacher stood up and stated that the culprit responsible for the writings had been apprehended. At that point this student was the only student who had been subjected to punishment. The implication was clear to the entire school community including parents and students that this student was directly responsible for the threats, rather than the mere dissemination that others made such threats. This student was already, prior to this incident in question, subject to abuse not by faulty or staff but by fellow students. The likelihood of this student reintegrating in a meaningful way in this student body would be problematic at best. Under questioning from this Administrative Law Judge the principal and assistant principal both stated that he could be reintegrated. This Administrative Law Judge has no doubt that the staff and faculty at this student's school of zone would do their job to the best of their ability, but in light of this student's past history in this school, this Administrative Law Judge does not believe it could ever be successful.

The parents requested as relief attendance at a private school some 40 to 50 miles from school of zone. The Administrative Law Judge finds this unnecessary. Rather, the LEA is ordered to place this student in another high school in its jurisdiction to implement the current 2004-2005 IEP which was previously developed in April 2004. Transportation is to be a related service.

In light of the overall relief requested, I find that the LEA is the prevailing party.

IT IS SO ORDERED this _____ day of August, 2004.

KEVIN S. KEY
Administrative Law Judge
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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing was served upon all parties to the above cause by depositing a copy thereof in the U.S. Mail, Nashville, Tennessee 37201, postage prepaid, in envelopes addressed to each of the attorneys of record herein at their respective addresses disclosed on the pleadings on Robert G. Wheeler, Jr., Esq., P.O. Box 198615 201 Nashville, TN 37219 and Cynthia E. Gardner, Esq., P.O. Box 121257, Nashville, TN 37212, on this the _____ day of August, 2004.

KEVIN S. KEY, #9519